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No. 97-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

LEONARD VINCI,

Petitioner,

v.

WASTE MANAGEMENT, INC., an Illinois corporation;
WASTE MANAGEMENT OF ALAMEDA COUNTY,

Respondents.

Petition for a Writ of Certiorari to the
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a former absorbed competitor turned employee have standing to sue under the antitrust laws when he is wrongfully discharged for disobeying his superior's order to become the Company's leading predatory agent in destroying the only remaining large independent in the San Francisco Bay Area, to complete the Company's monopolization of garbage disposal in that area?

2. Does an employee discharged for refusal to engage in the anticompetitive behavior have standing to sue where he admittedly brought the scheme to destroy the only remaining independent garbage company to the attention of the targeted company and thus averted the contemplated takeover?

3. Do not the circumstances in this case clearly favor standing within the five-part standing test of *Associated General Contractors v. California Council of Carpenters*, 459 U.S. 519 (1983)?

4. Does not the Ninth Circuit's broad statement that generally employees do not have standing to sue under the antitrust laws contradict this Court's seminal decision in *Radovich v. National Football League*, 352 U.S. 445 (1957) and the numerous cases that have followed it, as well as the ancient English cases which established the common law against restraints of trade and monopolies?

PARTIES TO THE PROCEEDINGS

Respondent, which was the defendant below, is Waste Management, Inc., the country's largest garbage collection company. Petitioner, who was the plaintiff below, is Leonard Vinci, a pioneer recycler in the San Francisco Bay Area, who competed with Waste management, Inc. until his recycling facility was taken over by Waste Management, and he became an employee thereof.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDINGS ii

OPINION BELOW 1

STATEMENT OF THE CASE 3

ASSOCIATED GENERAL CONTRACTORS SUPPORTS *VINCI* . . 6

THE DIFFERENCES ASSIGNED BY THE NINTH CIRCUIT BETWEEN *VINCI* AND *OSTROFE* ARE ILLUSORY 7

THE CIRCUIT'S DECISION DID NOT ACCORD VINCI HIS RIGHTS UNDER STANDARDS APPLICABLE TO DISMISSAL ON THE PLEADINGS 8

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases — Page Nos

Ashmore v. Northeast Petroleum, 843 F.Supp. 759, 772 (D., Me. 1994 5

Associated General Contractors v. California Council of Carpenters, 459 U.S. 519 (1983) . . . . . i, 4, 6, 8, 9

Bichan v. Chemetron Corp., 681 F.2d 514 . . . . . 4, 5

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 6, 9

Boisjoli v. Morton, Inc. 706 F.Supp. 794 (N.D. Utah, 1988) 5

Callahan v. Scott Paper, 541 F.Supp. 540 (E.D. Pa. 1988) 5

Donahue v. Pendleton Woolen Mills, 633 F.Supp. 1423 (S.D.N.Y. 1986) 5

Ostrofe I 4

Ostrofe v. H.S. Crocker Co., 740 F.2d 739 2

Ostrofe v. H.S. Crocker, Co. 740 F.2d 739 . . . . . 2, 4-8

Radovich v. National Football League, 352 U.S. 445 (1957) i

Reitz v. Canon, 695 F.Supp. 552 (S.D. Fla., 1988) 5

Shaw v. Russell Trucking, 542 F.Supp. 776 (W.D. Pa. 1982) 5

Thomason v. Mitsubishi, 701 F.Supp. 1563 (N.D. Ga., 1988) 5

Winter v. DEC,
625 F.Supp. 100 (D. Colo. 1985) 5

Statutes

Sherman Act
(15 U.S.C. §§1, 2) . . . . . passim

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Petitioner Leonard Vinci hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is appended hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals is dated April 10, 1996. A petition for rehearing and for an *en banc* hearing to resolve the apparent contradiction with the Ninth Circuit's own decision in *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 was denied on October 4, 1996. That denial is attached hereto as Appendix B.

Jurisdiction in the district Court was premised upon 28 U.S.C. §§ 1331 and 1337. Jurisdiction in this Court is based upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section of the Sherman Act (15 U.S.C. §1) provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

Section 2 of the Sherman Act (15 U.S.C. §2) provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or

> conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony. . ."

STATEMENT OF THE CASE

Petitioner Leonard Vinci became an employee of Respondent Waster Management, Inc. when Respondent acquired his pioneer recycling business. Vinci previously operated and wholly owned Vinci Enterprises, a competitor of Waste management in the recycling market. Vinci claimed that Waste Management was attempting to monopolize garbage collection and recycling by acquiring competitors and by engaging in predatory pricing. The monopolization would have been virtually complete if Waste Management could take over the San Francisco garbage collection company. Vinci alleged that he was ordered to implement a plan to damage and weaken the San Francisco company by predatory bidding sufficient to permit Waste Management to acquire the company at a distress price - a pattern he alleges was followed to make a series of acquisitions around the Bay Area. Acquisition of the San Francisco garbage company would have completed the circle. Vinci, who had long time friends and acquaintances in the San Francisco company disobeyed an order to engineer its destruction and was fired for that refusal with the terse comment by his boss, "If you don't have the stomach to do this, we'll get somebody who does." The plan to complete the circle around San Francisco Bay was frustrated when Vinci informed the San Francisco company of the reason for his firing, and then brought suit against Waste Management under the antitrust laws.

The case was dismissed by the District Court which specifically decided not to follow the Ninth Circuit's decision in *Ostrofe v. H.S. Crocker, Co.* 740 F.2d 739 and opted instead for the Seventh Circuit's contrary decision in *Bichan v. Chemetron Corp.*, 681 F.2d 514. The Seventh Circuit's decision came after *Ostrofe I*, but before the Ninth Circuit's reexamination in the light of *Associated General Contractors*.

With a certain degree of confidence, Vinci appealed to the Ninth Circuit contending that the District Court was bound to follow *Ostrofe* and not *Bichan*. That confidence was soon dashed in the decision, from which we seek certiorari, when the Court eviscerated *Ostrofe* without formally overruling it.

Petitioner contends that Judge Browning's evaluation of *Ostrofe* in the light of *Associated General Contractors* is correct, is logical and affords an otherwise wasted substantial opportunity to expose violations of secret antitrust plans which otherwise would go undebted.

Ostrofe, before its reexamination, is found at 670 F.2d 1334 and after its reexamination at 740 F.2d 740.

The *Vinci* case was dismissed on the pleadings and its affirmance on appeal looked only to the pleadings. Thus, an opportunity to clarify the tangled web of standing decisions in the federal court - they are all over the lot - presents itself in this petition.

This Court has addressed the concept of antitrust standing several times. Nevertheless, the federal appellate courts have split on the issue of whether an employee discharged for refusal to further an antitrust conspiracy has standing under the antitrust laws. (*Ostrofe* as against *Bichan, supra.*) Because of this split, the lower federal courts are in disarray, often coming to opposite conclusions in the same circumstances.

For example, federal cases allowing standing, see:

Ashmore v. Northeast Petroleum, 843 F.Supp. 759, 772 (D., Me. 1994); *Donahue v. Pendleton Woolen Mills*, 633 F.Supp. 1423, 1439 (S.D.N.Y. 1986); *Shaw v. Russell Trucking*, 542 F.Supp. 776, 781 (W.D. Pa. 1982).

For further example, federal cases denying standing in factually similar cases, see:

Boisjoli v. Morton, Inc. 706 F.Supp. 794, 804 (N.D. Utah, 1988); *Thomason v. Mitsubishi*, 701 F.Supp. 1563, 1570 (N.D. Ga., 1988); *Reitz v. Canon*, 695 F.Supp. 552, 554 (S.D. Fla., 1988); *Winter v. DEC*, 625 F.Supp. 100, 103 (D. Colo. 1985); *Callahan v. Scott Paper*, 541 F.Supp. 540, 551, 561 (E.D. Pa. 1988).

These contradictory results on similar facts do not enhance the image of the law, and leave the lower federal courts in a quandry even after *McCready* (*Blue Shield of Virginia v. McCready*, 457 U.S. 465, 482 (1982)) and *Associated General Contractors* had illuminated the issue. Indeed, the confusion has led different judges in the same

California District Court to contradictory opinions. Cf. *Gonsalves v. Kaiser Sand*, No. C92 3561 (N.D. Ca., 1993), granting standing with our Vinci case in the District Court denying standing (N.D. Ca., 1994).

These contradictory results before the courts have also generated scholarly comments with vehement advocates on both sides.

ASSOCIATED GENERAL CONTRACTORS SUPPORTS *VINCI*

Even according the Ninth Circuit, a subjective rendering of the five standards of *Associated General Contractors*, it is clear to petitioner that the Court read the Supreme Court restrictively. In *Ostrofe II*, the Court noted that in *Associated General Contractors*, the Supreme Court had reserved the question of whether a direct victim of an antitrust violation who suffers an injury unrelated to antitrust policies can have standing under Section 4. Within this reservation the *Ostrofe* Court allowed standing based on a number of policy questions: (1) the public interest in effective antitrust enforcement; (2) the desirability of encouraging exposure of antitrust violations; (3) the fact that the injury is intentional and caused by the violation; and (4) the avoidance of *Illinois Brick* problems, as the injury is direct, not remote.

Significantly the Supreme Court declined further review of the case. We respectfully request that it now accept the question it specifically reserved.

THE DIFFERENCES ASSIGNED BY THE NINTH CIRCUIT BETWEEN *VINCI* AND *OSTROFE* ARE ILLUSORY

The Ninth Circuit explained in *Vinci* that *Ostrofe* was given standing because "he was the direct victim of a horizontal boycott and because he was the victim of a unilateral discharge by one of the conspirators." It then says: "Vinci does not allege a boycott of his services by conspirators." This is the proverbial difference without a distinction. Vinci clearly alleges that he was hounded out of business and then boycotted by a monopolist. There is no distinction between a boycott by a monopolist and a boycott by a conspirator. It's just a matter of whether the violation involves Section 1 or Section 2 of the Sherman Act. Indeed the more convincing argument is that it is better to be boycotted by one of the conspirators than by a monopolist or a near monopolist, because there are more persons left to relent.

Moreover, the Court invented the idea that Ostrofe was an "essential participant" in the conspiracy. Agents willing to attend price-fixing meetings are hardly in short supply. When Vinci's boss declared "If you don't have the stomach to do this, we'll find somebody who does" thus could very well have been said or implied to Ostrofe. The further invention at page 4506 of the opinion that "there was no one else [other than Ostrofe] with as strong an incentive to vindicate the public interest in antitrust enforcement" simply belies the record. The *Ostrofe* decision states explicitly that the Department of Justice had filed both criminal and civil suits against the defendants. And it's not much of a secret to respondent's lawyers that Ostrofe's lawyers had filed damage actions on behalf of the buyers of labels before they filed for Ostrofe.

The attempts to distinguish the facts in *Ostrofe* as against the pleaded facts in Vinci are simply unrealistic and contradicted by the pleaded facts in *Vinci*, which must of course be accepted as true for the purposes of this decision. *Ostrofe* examined the facts in relation to this court's decision in *Associated General Contractors*. Its analysis accords with that decision, and fully covers the pleaded facts in *Vinci*.

THE CIRCUIT'S DECISION DID NOT ACCORD VINCI HIS RIGHTS UNDER STANDARDS APPLICABLE TO DISMISSAL ON THE PLEADINGS

The allegations of Vinci's complaint must of course be accepted as true and a complaint may not be dismissed under Rule 12 unless there is no reasonable legal basis for a recovery. He was the pioneer recycler in the Bay Area and had built a state-of-the-art plant and collection system. He operated under a wholly-owned corporation known as Vinci Enterprises, Inc. that company, according to the allegations, was put out of business and forced into bankruptcy by Waste management's anticompetitive acts, which thereafter acquired it and hired Vinci as an employee, leading to his termination for refusing to do their dirty work.

The complaint alleged that the actions against Vinci Enterprises, Inc. and Vinci were for the specific purpose of eliminating Vinci personally as a competitor in the recycling business. He was a personal party to the settlement agreements that effectively was used in its breach to render the company insolvent and lead to its acquisition by the respondent. These facts are set forth in the opinion of the Ninth Circuit

taken from the complaint. Plaintiff should have been given an opportunity to prove them for the jury questions they raised. Instead, the Court held that the presence of the bankrupt corporation shielded Respondent for its intended acts to eliminate Vinci personally, and thus compartmentalized the case, segregating the wrongful termination from its natural origins.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ are as follows:

1. The lower federal courts are in a tangled web of contradictory decisions since *McCready* and *Associated General Contractors*. The question presented here was specifically reserved by this Court in *Associated*.

2. The decision below wastes a vast investigative resource of employees fired for refusing to implement antitrust violations on the false ground that employees do not generally have standing under the antitrust laws.

3. A complaint alleging that a monopoly pursued and hounded a recycling competitor out of business personally should not be limited by the fact that one means and method of destroying him was to destroy his wholly-owned corporation under which the state-of-the-art

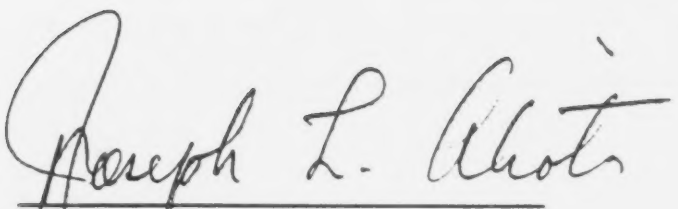
recycling facility operated, and from whose bankruptcy respondent took over the plant.

CONCLUSION

For all of the reasons heretofore stated, the Court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

LAW OFFICES OF
JOSEPH L. ALIOTO

By: 

Joseph L. Alioto
Attorney for Petitioner
Leonard Vinci

Leonard VINCI, Plaintiff-Appellant,
v.
WASTE MANAGEMENT, INC., an Illinois corporation; Waste Management of Alameda County, Inc., Defendants-Appellees.

No. 95-15000.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 13, 1996.

Decided April 10, 1996.

Former employee of waste removal corporation brought action against former employer under Clayton Act, alleging that employer had terminated him for refusing to engage in anticompetitive schemes, and that, prior to hiring him, employer had engaged in anticompetitive behavior against corporation owned and operated by him. The United States District Court for the Northern District of California, Fern M. Smith, J., 1994 WL 478163, dismissed complaint on ground of lack of standing. Employee appealed. The Court of Appeals, Beezer, Circuit Judge, held that: (1) alleged injury to employee's corporation did not provide employee with standing to sue under Clayton Act, and (2) employee did not have standing to sue under Clayton Act based on allegation that employer terminated employee for refusing to participate in anticompetitive behavior.

Affirmed.

[1] FEDERAL COURTS k776
170Bk776
Court of Appeals reviews dismissal for failure to state claim de novo. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] FEDERAL COURTS k776
170Bk776
Court of Appeals reviews questions of standing de novo.

[3] FEDERAL COURTS k794
170Bk794
In reviewing dismissal for failure to state claim, Court of Appeals takes all allegations of material fact as true and construes them in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] MONOPOLIES k28(1.6)
265k28(1.6)
In Clayton Act action, district court was not required to determine whether employee's combined status as shareholder and dismissed employee of employer was enough to provide standing; district court properly divided standing issue into two sub-issues of whether employee had standing as shareholder and whether he had standing as dismissed employee. Clayton Act, § 4, 15 U.S.C.A. § 15.

[5] MONOPOLIES k28(1.4)
265k28(1.4)
Factors that should be considered on case-by-case basis in determining whether plaintiff is proper party to bring antitrust action include: (1) motive of defendant, that is, whether it specifically intended to cause plaintiff's harm; (2) nature of plaintiff's injury, that is, whether it was of type the antitrust laws were designed to prevent; (3) directness of causal connection between violation and injury; (4) extent to which abstract speculation underlies allegations of injury and of their causation by defendant's antitrust violations; and (5) risk of duplicate recoveries or complex apportionment of damages if plaintiffs such as this are permitted to recover. Clayton Act, § 4, 15 U.S.C.A. § 15.

[5] MONOPOLIES k28(1.6)
265k28(1.6)
Factors that should be considered on case-by-case basis in determining whether plaintiff is proper party to bring antitrust action include: (1) motive of defendant, that is, whether it specifically intended to cause plaintiff's harm; (2) nature of plaintiff's injury, that is, whether it was of type the antitrust laws were designed to prevent; (3) directness of causal connection between violation and injury; (4) extent to which abstract speculation underlies allegations of injury and of their causation by defendant's antitrust violations; and (5) risk of duplicate recoveries or complex apportionment of damages if plaintiffs such as this are permitted to recover. Clayton Act, § 4, 15 U.S.C.A. § 15.

[6] MONOPOLIES k28(1.4)
265k28(1.4)
Alleged injury to corporation due to second corporation's alleged anticompetitive behavior did not provide shareholder of first corporation with standing to sue under Clayton Act. Clayton Act, § 4, 15 U.S.C.A. § 15.

[6] MONOPOLIES k28(1.6)
265k28(1.6)
Alleged injury to corporation due to second corporation's alleged anticompetitive behavior did not provide shareholder of first corporation with standing to sue under Clayton Act. Clayton Act, § 4, 15 U.S.C.A. § 15.

[7] MONOPOLIES k28(1.6)
265k28(1.6)
Rule, that shareholder of corporation injured by antitrust violations has no standing to sue in his or her own name, applies even if injured shareholder is sole shareholder, or if shareholder alleges that antitrust violations were intended to drive individual out of industry. Clayton Act, § 4, 15 U.S.C.A. § 15.

[8] MONOPOLIES k28(1.6)
265k28(1.6)
Former employee did not have standing, based on allegation that employer eliminated his job because he refused to participate in anticompetitive behavior, to sue employer under Clayton Act; employee was neither competitor nor consumer in relevant market, employee did not allege facts suggesting that he was essential to alleged antitrust scheme or that his termination was necessary to accomplish alleged scheme, and corporations which were direct victims of alleged anticompetitive behavior had greater incentive than employee to challenge such behavior. Clayton Act, § 4, 15 U.S.C.A. § 15.

[9] MONOPOLIES k28(1.4)
265k28(1.4)
Loss of job is not type of injury that antitrust laws were designed to prevent. Clayton Act, § 4, 15 U.S.C.A. § 15.

[10] MONOPOLIES k10
265k10

Antitrust laws are intended to preserve competition for benefit of consumers in market in which competition occurs. Clayton Act, § 4, 15 U.S.C.A. § 15.

[11] MONOPOLIES k28(1.6)
265k28(1.6)
Requirement for standing to sue under antitrust laws, that alleged injury be related to anti-competitive behavior, requires, as corollary, that injured party be participant in same market as alleged malefactors. Clayton Act, § 4, 15 U.S.C.A. § 15.

[12] MONOPOLIES k28(1.4)
265k28(1.4)
Plaintiff who is neither competitor nor consumer in relevant market does not suffer antitrust injury. Clayton Act, § 4, 15 U.S.C.A. § 15.

[13] MONOPOLIES k28(1.6)
265k28(1.6)
Exception of Ostrofe v. H.S. Crocker Co., to rule that dismissed employee does not have standing to sue former employee for antitrust injury, is limited to those cases in which dismissed employee is essential participant in antitrust scheme, dismissal is necessary means to accomplish scheme, and employee has the greatest incentive to challenge antitrust violation. Clayton Act, § 4, 15 U.S.C.A. § 15.
*1373 Joseph L. Alioto, Law Offices of Joseph L. Alioto, San Francisco, California, for plaintiff-appellant.

Alfred C. Pfeiffer, Jr., and Frank M. Hinman, McCutchen, Doyle, Brown & Enersen, San Francisco, California, for defendants-appellees.

Appeal from the United States District Court for the Northern District of California, Fern M. Smith, District Judge, Presiding. No. CV-94-01946-FMS.

Before CHOY, BEEZER and HAWKINS, Circuit Judges.

BEEZER, Circuit Judge:

Leonard Vinci appeals the district court's dismissal of his complaint for lack of standing. Vinci contends that, as a dismissed employee of Waste Management, Inc., he has standing under the Clayton Act, 15 U.S.C. §

15, to sue for damages for injuries resulting from an alleged violation of the Sherman Act, 15 U.S.C. §§ 1 and 2, by Waste Management, Inc. and its subsidiary, Waste Management of Alameda County, Inc. (collectively, "Waste Management"). We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

I

Leonard Vinci owned and operated Vinci Enterprises, Inc. ("VEI"), a waste recycling business. In 1989, VEI entered into a settlement agreement with Waste Management to settle a lawsuit against Oakland Scavenger Company alleging anti-competitive behavior. Oakland Scavenger was acquired by Waste Management while the lawsuit was pending. The settlement agreement required Waste Management to provide VEI with recyclable materials to operate its plant.

Vinci alleges that Waste Management breached the settlement agreement with the purpose of driving VEI out of business. Vinci alleges that Waste Management did this *1374 by, among other things, encouraging other recycling haulers to acquire accounts that VEI desired from Waste Management, refusing to deliver accounts to VEI, and intercepting materials en route to VEI's recycling facility. Thereafter, Waste Management acquired VEI's recycling plant and hired Vinci as its employee.

During his employment with Waste Management, Vinci alleges that senior management asked him to cooperate in anti-competitive schemes. These included a plan to drive Richard Valle, a joint venturer, out of business and a plan to engage in predatory price competition against Norcal, Inc. with the intent to ultimately acquire Norcal at a distressed price. On December 2, 1992, Waste Management fired Vinci. Vinci alleges that he was terminated because he refused to engage in the anti-competitive schemes.

On January 12, 1994, Vinci filed suit in California Superior Court alleging anti-competitive actions in violation of the California Cartwright Act. Cal. Bus. & Prof. Code §§ 16700-16770. Vinci's complaint was dismissed for lack of standing. [FN1] Vinci then filed the present

lawsuit under section 4 of the Clayton Act. 15 U.S.C. § 15. The lawsuit alleges that the same anti- competitive actions violated sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2.

FN1. The dismissal was affirmed by the California Court of Appeal in Vinci v. Waste Management, Inc., 36 Cal.App.4th 1811, 43 Cal.Rptr.2d 337 (1995).

The district court dismissed Vinci's first amended complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court reasoned that Vinci lacked standing under the Clayton Act to challenge the alleged anti-competitive acts engaged in by Waste Management. The court concluded that Vinci did not have standing to challenge the actions taken against VEI because the injury was to the corporation, not to Vinci as shareholder. The court also concluded that Vinci lacked standing to challenge his termination by Waste Management because Vinci failed to come within an exception to the general rule that a terminated employee may not sue his corporate employer under the Clayton Act.

II

[1][2][3] We review de novo a dismissal for failure to state a claim. Barrus v. Sylvania, 55 F.3d 468, 469 (9th Cir.1995). In addition, we review de novo questions of standing. Id. In reviewing the dismissal for failure to state a claim, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. National Wildlife Fed'n v. Espy, 45 F.3d 1337, 1340 (9th Cir.1995).

III

[4] Vinci first argues that the district court erred because it did not view his allegations as a whole. He argues that the court should not have divided the standing issue into the two sub-issues whether he had standing as a shareholder and whether he had standing as a dismissed employee. Instead, he argues, the district court should have determined whether his combined status as both shareholder and dismissed employee was enough to provide standing. Vinci cites Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698, 82 S.Ct. 1404,

1409-10, 8 L.Ed.2d 777 (1962) for the proposition that allegations must be viewed as a whole and should not be compartmentalized.

Vinci misreads Continental Ore. Continental Ore holds that substantive allegations of conspiratorial antitrust behavior should be considered as a whole. This proposition does not apply to the issue whether a person has standing to challenge antitrust behavior. The district court considered the alleged antitrust behavior, and then determined if Vinci had standing to challenge it. The district court examined all the possible theories of standing, of which there were two. The district court was obliged to consider both possibilities, and it did so. It did not err.

IV

Vinci next contends that the district court erred in determining that he did not have standing to sue under section 4 of the Clayton *1375 Act. [FN2] Section 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained ...." 15 U.S.C. § 15.

FN2. In a separate argument, Vinci argues that he should have been found to have standing under section 16 of the Clayton Act. 15 U.S.C. § 26. Vinci's argument is fallacious. Vinci's complaint does not mention section 16. It states "[t]hese proceedings are brought under the provisions of Section 4 of the Clayton Act." In addition, section 16 provides for "injunctive relief against threatened conduct," and Vinci did not seek any such remedy.

[5] Although section 4 appears quite broad, it has been read more narrowly by the courts. In Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 535 n. 31, 103 S.Ct. 897, 907 n. 31, 74 L.Ed.2d 723 (1983), the Supreme Court held that in determining whether a plaintiff has antitrust standing, "[h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." The Court explained that there is not "a black-letter rule that will dictate the result in every case," but there are several

factors that should be considered on a case-by-case basis. Id. at 536-45, 103 S.Ct. at 907-12. These factors include:

(1) the motive of the defendant--whether it specifically intended to cause plaintiff's harm; (2) the nature of plaintiff's injury--whether it was of a type the antitrust laws were designed to prevent; (3) the directness of the causal connection between the violation and the injury; (4) the extent to which abstract speculation underlies the allegations of injury and of their causation by defendant's antitrust violations; and (5) the risk of duplicate recoveries or complex apportionment of damages if plaintiffs such as this are permitted to recover.

Los Angeles Memorial Coliseum Comm'n v. National Football League, 791 F.2d 1356, 1363 (9th Cir.1986) (citing Associated Gen. Contractors, 459 U.S. at 537-45, 103 S.Ct. at 908-12), cert. denied, 484 U.S. 826, 108 S.Ct. 92, 98 L.Ed.2d 53 (1987).

Vinci argues that he has standing because he suffered injury as a result of anti-competitive behavior by Waste Management. Vinci, in general, complains that he was driven out of the recycling business. More specifically, Vinci complains of two injuries: (1) damage to VEI and (2) his termination by Waste Management.

A

[6][7] First, Vinci complains that his recycling business was damaged by Waste Management's alleged breach of its settlement agreement and anti- competitive behavior. Such an injury to VEI does not provide Vinci, as a shareholder in VEI, standing to sue. "A shareholder of a corporation injured by antitrust violations has no standing to sue in his or her own name...." Solinger v. A. & M. Records, Inc., 718 F.2d 298, 299 (9th Cir.1983). This rule applies even if the injured shareholder is the sole shareholder, Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 439 (9th Cir.1979), or if the shareholder alleges that the antitrust violations were intended to drive the individual out of the industry. Stein v. United Artists Corp., 691 F.2d 885, 897 (9th Cir.1982). "If shareholders were permitted to recover their losses directly, there would be the possibility of a double recovery, once by the shareholder and again by the corporation." Id. at 896-97.

B

[8] Second, Vinci complains that he was injured when his job with Waste Management was eliminated because he allegedly refused to participate in anti- competitive behavior. Vinci argues that our holding in Ostrofe v. H.S. Crocker Co., 740 F.2d 739 (9th Cir.1984) ("Ostrofe II "), [FN3] cert. dismissed, 469 U.S. 1200, 105 S.Ct. 1155, 84 L.Ed.2d 309 (1985) compels a finding of standing for employees *1376 terminated for refusing to participate in anti-competitive behavior. We disagree.

FN3. The Supreme Court vacated the judgment in Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir.1982) ("Ostrofe I ") and remanded for further consideration in light of Associated Gen. Contractors, 459 U.S. 519, 103 S.Ct. 897.

[9][10][11][12] The loss of a job is not the type of injury that the antitrust laws were designed to prevent. "The antitrust laws are intended to preserve competition for the benefit of consumers in the market in which competition occurs." In re Ins. Antitrust Litig., 938 F.2d 919, 926 (9th Cir.1991), rev'd in part on other grounds, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612, and cert. denied, — U.S. —, 113 S.Ct. 3034, 125 L.Ed.2d 721 (1993). "The requirement that the alleged injury be related to anti- competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors." Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir.1985). "[A] plaintiff who is 'neither a competitor nor a consumer' in the relevant market does not suffer 'antitrust injury.' " In re Ins. Antitrust Litig., 938 F.2d at 926 (quoting R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 148 (9th Cir.1989)). Vinci was neither a competitor nor a consumer. His termination was not an antitrust injury. Furthermore, as for any antitrust injuries suffered by Valle or Norcal, Vinci is not the proper plaintiff to bring suit; Valle and Norcal are.

Although antitrust standing is generally limited to customers and competitors, in Ostrofe II we recognized that a dismissed employee had antitrust standing. 740 F.2d at 740. Contra Feeney v. Chamberlain Mfg. Corp., 831 F.2d 93, 95-96 (5th Cir.1987) (holding dismissed employee lacked standing under section 4 of the Clayton Act); Gregory Mktg. Corp. v. Wakefern Food Corp., 787 F.2d 92, 96 (3d Cir.)

(rejecting rationale of Ostrofe II), cert. denied, 479 U.S. 821, 107 S.Ct. 87, 93 L.Ed.2d 40 (1986); In re Indus. Gas Antitrust Litig., 681 F.2d 514, 519 (7th Cir.1982) (rejecting Ostrofe I holding and adopting Judge Kennedy's dissent in same), cert. denied, 460 U.S. 1016, 103 S.Ct. 1261, 75 L.Ed.2d 487 (1983). In Ostrofe II, a sales manager of a label manufacturing company was fired after he refused to cooperate in a price-fixing conspiracy, and he was subsequently boycotted from employment by the conspirators. 740 F.2d at 742. We found that he had standing both because he was the direct victim of a horizontal boycott and because he was the victim of a unilateral discharge by one of the conspirators. Id. at 742-48.

Vinci does not allege a boycott of his services by conspirators. He argues instead that Ostrofe II stands for the proposition that an employee who refuses to participate in anti-competitive behavior and is terminated as a result has antitrust standing. Vinci reads Ostrofe II much too broadly.

Ostrofe II recognized a limited exception to the general rule that a terminated employee lacks antitrust standing. In Ostrofe II, we held that Ostrofe had standing to challenge a price-fixing conspiracy in the market for labels because Ostrofe was more than merely injured by his termination. Ostrofe was an "essential participant" in the price-fixing scheme, and the scheme "could not succeed without his active cooperation." Id. at 745-46. When he refused to participate, "his discharge was a necessary means to achieve the conspirators' illegal end as well as an integral and inextricable part of the anticompetitive scheme." Id. Furthermore, because the anti-competitive behavior alleged was a price-fixing conspiracy, there was "no one else with as strong an incentive 'to vindicate the public interest in antitrust enforcement.' " Id. (quoting Associated Gen. Contractors, 459 U.S. at 542, 103 S.Ct. at 910-11).

[13] The exception recognized in Ostrofe II is limited to those cases in which a dismissed employee is an "essential participant" in an antitrust scheme, the dismissal is a "necessary means" to accomplish the scheme, and the employee has the greatest incentive to challenge the antitrust violation. Cf. Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 580 (9th Cir.1986) (holding that under Ostrofe II dismissed licensing agent corporation did not have antitrust standing to challenge splitting agreement between motion picture exhibitors because

not essential participant in scheme and dismissal was not necessary to accomplish scheme). Vinci does not fall within this exception. Vinci did not allege any facts which suggest that he was essential to the *1377 alleged antitrust scheme or that his termination was necessary to accomplish the scheme. Furthermore, Valle and Norcal have a greater incentive as direct victims to challenge any antitrust acts in which Waste Management allegedly engaged.

V

Vinci, as a shareholder in VEI, did not have standing to challenge alleged anti-competitive actions taken against VEI. Vinci also did not have standing as a dismissed employee. He was neither a competitor nor a customer, and he did not fall within the Ostrofe II exception.

AFFIRMED.

(2)

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No. 97- OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

LEONARD VINCI,

Petitioner,

v.

WASTE MANAGEMENT, INC., an Illinois corporation;
WASTE MANAGEMENT OF ALAMEDA COUNTY,

Respondents.

**Supplemental Appendix to the
Petition for a Writ of Certiorari to the
SUPREME COURT OF THE UNITED STATES**

SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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13 pp

INDEX TO APPENDIX

TITLE	PAGE
United States District Court, N.D. California Order of Dismissal filed August 25, 1994 in Case No. C 94-1946 *LEONARD VINCI vs. WASTE MANAGEMENT, INC. and WASTE MANAGEMENT OF ALAMEDA COUNTY, INC.*	1

Leonard G. VINCI, Plaintiff,
v.
WASTE MANAGEMENT, INC., an Illinois corporation, and Waste Management of Alameda County, a California corporation, Defendants.

No. C 94-1946 FMS.

United States District Court,
N.D. California.

Aug. 25, 1994.

ORDER OF DISMISSAL

FERN M. SMITH, District Judge.

ISSUES

*1 Defendant's motion to dismiss requires the Court to determine whether plaintiff can maintain a treble damages action against the defendant under the Clayton Act, 15 U.S.C. § 15 (1994), for defendant's alleged violation of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1994). The Court must also decide whether plaintiff has standing to seek damages for breach of contract and whether his claim for intentional infliction of emotional distress is time-barred.

BACKGROUND

In 1989, plaintiff Leonard Vinci ("Vinci"), entered into a settlement agreement with defendant Waste Management, Inc. ("Waste Management"), involving his company, Vinci Enterprises, Inc. ("VEI"), and an acquired subsidiary of Waste Management, Oakland Scavenger (now known as Waste Management of Alameda County). Under the agreement, defendant allegedly promised to provide Vinci and/or VEI [FN1] substantial quantities of recyclable materials. Subsequently, Waste Management employed Vinci who was then terminated in December, 1992.

Vinci alleges that Waste Management breached the settlement agreement in order to drive Vinci out of business and to control competition in the

recycling business. The alleged breach included: (a) encouraging other recycling haulers to solicit accounts from Waste Management to take business away from VEI; (b) refusing to deliver specific accounts to VEI; (c) diverting accounts from VEI; (d) intercepting and diverting materials destined for VEI; (e) procrastinating in procuring a lucrative account promised for VEI. Vinci further alleges that Waste Management employed Vinci in order to prevent him from providing relevant testimony in an alleged lawsuit involving Vinci's successor and Waste Management. Vinci alleges that, during the course of his employment, he was repeatedly asked to cooperate with Waste Management's predatory schemes and conspiracies designed to destroy competition in the recycling business. He further alleges that he was ultimately terminated for refusing to assist in these illegal activities.

Vinci filed an action in California Superior Court on January 12, 1994, alleging antitrust claims under the California Cartwright Act, Cal.B. & P.Code § 16,700, et seq, which were virtually identical to the claims made by Vinci here. The claims were dismissed by a demurrer.

Vinci filed this action against Waste Management and Waste Management of Alameda County for violation of the Sherman Act and for breach of contract and intentional infliction of emotional distress. Waste Management filed this motion to dismiss under Fed.R.Civ.P. 12(b)(6) based on Vinci's lack of antitrust standing and, alternatively, for Vinci's failure to allege a Sherman Act violation by Waste Management. Waste Management also seeks to dismiss Vinci's claim of intentional infliction of emotional distress as time-barred and Vinci's contract claim based on lack of standing and failure to allege the necessary elements for breach of contract.

DISCUSSION

I. The Legal Standard

*2 A motion to dismiss pursuant to Rule 12(b)(6) tests only the sufficiency of the complaint. North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir.1983). Dismissal of an action pursuant to Rule 12(b)(6) is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir.1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02 (1957)). In reviewing the motion, the Court must assume all factual

allegations to be true and must construe them in the light most favorable to the nonmoving party. North Star, 720 F.2d at 580. The Court may dismiss the complaint, or any claims within it, for failure to state a claim if it "appear[s] to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved." Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir.1987). In considering a motion to dismiss, the district court must take all allegations of material fact as true and construe them in the light most favorable to the non-moving party. Id.

II. Vinci Lacks Antitrust Standing to Sue Waste Management Under the Clayton Act

Antitrust standing derives from section 4 of the Clayton Act which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court for the United States ... and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fees." 15 U.S.C. § 15 (1994).

Although a literal reading of the statute arguably encompasses almost every conceivable harm remotely related to antitrust violations, "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might be traced to an antitrust violation." Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters ("AGC "), 459 U.S. 519, 103 S.Ct. 897, 906 (1983) (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 92 S.Ct. 885, 891 n. 14 (1972)). A plaintiff "must prove more than injury causally linked to an illegal presence in the market." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 697 (1977). In order to recover threefold damages under 15 U.S.C. § 15, "a plaintiff must prove the existence of 'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' " Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S.Ct. 1884, 1889 (1990) (quoting Brunswick, 97 S.Ct. at 697 (emphasis in original)). An injury will not qualify as an "antitrust injury" unless it is attributable to an anti-competitive aspect of the defendant's practices. Id. The determination of antitrust standing "is a question of law." Bubar v. Ampco Foods, Inc., 752 F.2d 445, 449 (9th Cir.1985).

*3 Vinci alleges that he was directly harmed as a result of Waste Management's efforts to eliminate his presence in the relevant marketplace.

This was allegedly accomplished by first forcing him from the business of recycling and then firing him due to his refusal to cooperate in a predatory price plan. The Court must evaluate Vinci's antitrust standing under both scenarios.

At oral argument, counsel for plaintiff suggested that evaluating Vinci's antitrust claims separately (i.e. as shareholder of a competing corporation and as employee of defendant) disregards the teaching of Continental Ore Co. v. Union Carbide, 370 U.S. 690, 82 S.Ct. 1404 (1962). In Continental Ore, a series of acts performed in furtherance of a conspiracy by "defendants and others acting in concert with them" resulted in harm to a plaintiff corporation's business. Id. at 1407-08. The Supreme Court ruled that, in determining defendant's liability, the individual acts by the co-conspirators against the corporation should not be treated as "separate and unrelated lawsuits." Id. at 1410.

This Court's analysis does not run counter to the above principle. Vinci's claims allege separate harms to two distinct legal entities--harm to the corporation of which he is a shareholder and harm to Vinci personally, as a Waste Management employee. A separate analysis of these claims is essential in order to properly distill the legal issues involved in each, be fair to the litigants, and not threaten to obfuscate the presence of any alleged conspiracy.

A. Vinci Lacks Antitrust Standing as a Shareholder of an Injured Corporation

"A shareholder of a corporation injured by antitrust violations has no standing to sue in his or her name...." Solinger v. A & M Records, Inc., 718 F.2d 298, 299 (9th Cir.1983). This rule is applicable even if the injured shareholder is the sole stockholder of the corporation. Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 439 (9th Cir.1979).

Vinci's complaint alleges that Waste Management deprived VEI of recyclable material needed to continue operations through a variety of anti-competitive practices intended to drive Vinci out of business. As a competitor of Waste Management in the relevant marketplace, VEI would have standing to file suit under the Clayton Act for any alleged wrongdoing on the part of Waste Management. See AGC, 103 S.Ct. at 908. Vinci contends, however, that he should be given individual antitrust standing because Waste Management's practices were targeted directly at him and

were intended to put Vinci himself out of business. This argument lacks merit.

In Stein v. U.A. Corp., 691 F.2d 885 (9th Cir.1982), the primary shareholder and officer of a corporation attempted to sue the defendant corporation for antitrust injuries. Like Vinci, Stein alleged that the defendant's actions were intended "to drive him out of the industry." Id. at 897 (emphasis added). In denying standing to the individual shareholder, the court noted that regardless of whether the actions taken were focused on the corporation or the individual shareholder, the apparent wrongdoing was carried out against the corporation. Id.

*4 As in Stein, Vinci alleges wrongful acts carried out against the injured corporation, VEI. Accordingly, the Court finds that Vinci lacks antitrust standing solely by virtue of his status as a VEI shareholder.

B. Vinci Lacks Antitrust Standing as an Employee that was Terminated by Waste Management

The Supreme Court has enunciated various policy factors that courts should consider in determining whether a class of plaintiffs should be allowed to bring suit under 15 U.S.C. § 15:

(1) whether the alleged injury is of the type the antitrust laws were intended to forestall;
(2) the directness of the injury;
(3) the speculative measure of the harm;
(4) the risk of duplicative recovery;
(5) the complexity in apportioning damages.

Bubar, 752 F.2d at 448-49. These factors favor antitrust standing for consumers of products or services (see Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540 (1982)) and competitors in the market in which trade is restrained (see United States v. Topco Assoc., Inc., 405 U.S. 596, 92 S.Ct. 1126 (1972)). AGC, 103 S.Ct. at 908-09.

In addition, the Ninth Circuit has allowed an employee that has been terminated by a corporation to sue his employer under the Clayton Act. Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739 (9th Cir.1984). In Ostrofe, the plaintiff was forced to resign as marketing director for the defendant corporation because he refused to take part in a conspiracy to restrain trade in violation of 15 U.S.C. § 1. Id. at 741-42. The plaintiff violated the agreement between the defendant corporation and the

co-conspirator corporations by soliciting accounts with businesses not involved in the conspiracy. The plaintiff was then forced to resign his position and boycotted from future employment in the industry. Id. The court held that conferring antitrust standing on this plaintiff was consistent with the purposes of the Clayton Act. Id. at 747.

As subsequent Ninth Circuit opinions have noted, the marketing director in Ostrofe was granted antitrust standing because (1) his injury was directly caused by an intentional boycott of his services; (2) his injury was of a type the antitrust laws were intended to prevent; and (3) he was the natural vindicator of the antitrust violation. Lucas v. Bechtel Corp., 800 F.2d 839, 846 (9th Cir.1986) (citing Ostrofe, 740 F.2d at 742-43).

Vinci maintains that Ostrofe is directly on point, compelling denial of Waste Management's motion to dismiss. Ostrofe, however, is readily distinguishable and its application to the facts of this case would unnecessarily expand a relatively narrow holding of the ninth circuit. [FN2]

1. Vinci's Alleged Injury was not Caused by an Intentional Boycott of His Services

Vinci has not alleged in his complaint an intentional boycott of his services. This factor is of particular importance because the court in Ostrofe expressly based its holding on the presence of the boycott. [FN3]

2. Vinci's Alleged Injury was not of a Type the Antitrust Laws Were Intended to Prevent

*5 "The requirement that the alleged injury be related to anticompetitive behavior requires as a corollary, that the injured party be a participant in the same market as the alleged malefactors." Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir.1985). "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 540 (9th Cir.1987). This factor is of "tremendous significance", Bhan, 772 F.2d at 1470 n. 3, and weighs heavily against those who are neither competitors nor consumers. Lucas, 800 F.2d at 844.

Although the plaintiff in Ostrofe was neither a competitor nor a consumer, his position as marketing director was critical to the success of the price-fixing agreement, and his failure to participate in the conspiracy by his employer "stood as a clear impediment to its effectuation." Exhibitors' Serv., Inc. v. American Multi-Cinema, 788 F.2d 574, 580 (9th Cir.1986) (citing Ostrofe, 740 F.2d at 745-46). "Ostrofe was an 'essential participant' in the scheme, which could not succeed without his active participation.' " Id. (quoting Ostrofe, 740 F.2d at 745-46). A plaintiff can, therefore, satisfy the participant in the marketplace prong if his injury is "inextricably intertwined" with the antitrust violation. Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209, 211 (6th Cir.1989).

Vinci is neither a consumer nor a competitor in the same market as Waste Management. This fact alone "weighs heavily" against Vinci but does not automatically preclude standing. Id. at 211. What does ultimately prove fatal to Vinci's claim of antitrust standing is his failure to allege facts showing that his injury is "inextricably intertwined" with Waste Management's alleged antitrust violation. Vinci has not alleged that he was an "essential participant" in Waste Management's alleged conspiracy or that the conspiracy could not succeed without his participation. He, therefore, has no standing to pursue the alleged antitrust violations.

This conclusion finds support in the state court's disposition of Vinci's claims against Waste Management under the Cartwright Act, Business & Professions Code § 16,700 et seq (analogous to the Sherman Act). Vinci v. Waste Management, Inc., No. 957805 (Cal.Super.Ct. May 4, 1994) ("Vinci ") (order sustaining defendant's demurrer in part and overruling it in part). The San Francisco Superior Court (Cahill, J.) sustained Waste Management's demurrer and specifically declined to extend antitrust standing to Vinci under Ostrofe, noting that "[Ostrofe] requires that a fired employee must show that the antitrust violation will be unremedied without the employee's lawsuit and that the Plaintiff is an essential participant in the alleged wrongful conduct and that the conduct could not succeed without his cooperation." Id.

3. Vinci is not the Natural Vindicator of Waste Management's Alleged Antitrust Violation

*6 "The 'existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust

enforcement diminishes the justification for allowing a more remote party ... to perform the office of a private attorney general.' " Atlantic Richfield, 110 S.Ct. at 1895.

According to Vinci's complaint, Waste Management's alleged antitrust violation primarily involved an attempt to monopolize the garbage collection and recycling business through a series of acquisitions and the use of predatory means to destroy competitors. Vinci's injury is a byproduct of the alleged antitrust violation; the wrongful result Waste Management allegedly sought was the reduction of competition and competitors. See Fallis, 866 F.2d at 211. Waste Management's "competitors are much more immediate victims of the alleged conspiracy." Lucas, 800 F.2d at 844.

Ostrofe is distinguishable here as well. The court in Ostrofe noted that although others might have been more directly victimized by the alleged conspiracy, it was unlikely that anyone else would have "equal incentive to bring the antitrust violators to account" and would therefore leave a significant antitrust violation unremedied. Ostrofe, 740 F.2d at 747. In this case, however, Waste Management's competitors would be directly injured and would have ample incentive to seek relief under the Clayton Act, if their existence was threatened by Waste Management's practices. Any alleged antitrust violation would, therefore, not go undetected if Vinci is denied standing. [FN4]

III. Vinci Has Failed to Allege a Sherman Act Violation

The Sherman Act distinguishes between concerted and independent actions. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S.Ct. 1464, 1469 (1984). Section 1 of the Act reaches unreasonable restraints of trade effected by a conspiracy between separate entities. Copperweld Corp. v. Independence Tribe Corp., 467 U.S. 752, 104 S.Ct. 2731, 2740. Employees of a firm "do not provide the plurality of actors imperative for a section 1 conspiracy," nor does "the coordinated activity of a parent and its wholly owned subsidiary." Id. at 2741. Vinci sued only Waste Management and its subsidiary, Waste Management of Alameda County, and failed to allege in his complaint a "contract, combination ... or conspiracy between separate entities." Id. at 2740 (emphasis in original). The only multi-party conduct alleged in Vinci's complaint is Waste Management's intentional encouragement of other recycling haulers to solicit accounts from Waste Management. Such encouragement is not

necessarily a section 1 agreement; furthermore, Vinci fails to allege that anyone other than Waste Management ever had any wrongful intent. See, e.g. Monsanto, 104 S.Ct. at 1473. [FN5]

The conduct of a single firm is governed by 15 U.S.C. § 2 and is unlawful only when the firm's conduct poses a danger of monopolization. Copperweld, 104 S.Ct. at 2739-740. An attempted monopolization claim has three essential elements: (1) specific intent to eliminate competition; (2) anticompetitive conduct directed at accomplishing this unlawful objective; and (3) "a dangerous probability of success." Thurman Indus. v. Pay 'N Pak Stores, 875 F.2d 1369, 1378 (9th Cir.1989). Vinci has failed to allege in his complaint both specific intent and likelihood of success of an attempted monopoly. The absence of these elements in Vinci's complaint makes it susceptible to a motion for dismissal. See Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 736 (9th Cir.1987).

*7 For these reasons, the Court finds that Vinci has failed to allege a claim against Waste Management consistent with a violation of the Sherman Act.

IV. Vinci Lacks Standing to File the Breach of Contract Claim Against Waste Management

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." Cal.Code Civ.P. § 367. Vinci's breach of contract claim revolves around Waste Management's alleged breach of a settlement agreement between Waste Management and VEI. As a shareholder of VEI, Vinci does not have a cause of action for damages to the corporation. Anderson v. Derrick, 220 Cal. 770, 773 (1934). It is VEI, not Vinci, that contracted with Waste Management; therefore, only VEI can seek judicial enforcement of the agreement.

V. Vinci's Intentional Infliction of Emotional Distress Claim is Time-Barred

Personal injury torts are foreclosed, by statute, after one year. Cal.Code Civ.P. § 340. This includes actions based on intentional infliction of emotional distress. Eisenberg v. Ins. Co. of North America, 815 F.2d 1285, 1292 (9th Cir.1987). Vinci was terminated by Waste Management

on December 2, 1992, and his complaint was filed more than one year later, on June 1, 1994. Vinci's claim is time-barred.

Conclusion

For all the reasons herein set forth, the Court grants defendant's motion to dismiss this complaint. The claim for intentional infliction of emotional distress is dismissed with prejudice. For all remaining causes of action, the Court dismisses without prejudice and grants plaintiff fifteen days (15) from issuance of this Order to properly allege standing and a cognizable Sherman Act claim. Any amended complaint filed pursuant to this Order shall include a copy of the alleged settlement agreement.

SO ORDERED.

FN1. Plaintiff did not include a copy of the settlement agreement with the complaint.

FN2. See, e.g. Gregory Marketing Corp. v. Wakefern Food Corp., 787 F.2d 92, 96 (3d. Cir.1986) (the view that discharged employees have antitrust standing generally rejected); Rafferty v. Nynex Corp., 744 F.Supp. 324 (D.D.C.1990) (most courts which have considered the issue in Ostrofe have rejected the holding); Boisjoly v. Morton Thiokol, Inc., 706 F.Supp. 795, 805 (D.Utah 1988) ("Ostrofe's holding is ... contrary to virtually all other decisions addressing the issue."); Winther v. DEC Int'l, Inc., 625 F.Supp. 100, 103 (D.Colo.1985) ("Nothing in Associated General Contractors supports [Ostrofe 's] interpretation of the scope of antitrust law.").

FN3. Ostrofe first reached the Ninth Circuit in 1982 where the court found standing. Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir.1982) ("Ostrofe I "). The Supreme Court vacated this holding and remanded "for further consideration in light of [AGC]." 460 U.S. 1007 (1983). On remand, the ninth circuit noted that AGC did not dictate reversal even if the court had "expanded" the concept of "antitrust injury" too broadly. Ostrofe, 740 F.2d at 746. This conclusion was predicated on a footnote in the majority opinion of AGC which reserved the question "of whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the

ultimate purpose of the boycott is to restrain competition in the relevant economic market." Id. (quoting AGC, 103 S.Ct. at 910 n. 44).

FN4. See also Vinci, No. 957805 at 2.

FN5. 15 U.S.C. § 1 requires a claimant to allege and prove three elements: "(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; (3) which actually injures competition." Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir.1989).

Supreme Court, U.S.
FILED
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No. 96-1130

In The

Supreme Court of the United States

October Term, 1996

LEONARD VINCI,

Petitioner,

vs.

WASTE MANAGEMENT, INC. AND WASTE MANAGEMENT OF ALAMEDA COUNTY, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Court of Appeal held that petitioner Vinci lacks antitrust standing to complain about respondents' alleged anticompetitive acts, either as a former shareholder of a company allegedly injured by some of those acts or as an employee allegedly terminated for refusing to participate in other of those acts. Should the Court review the Court of Appeal's decision, given that:

1. The decision does not conflict with any decision of any other federal circuit or any state court of last resort, and, if anything, resolves a conflict between the Ninth Circuit and other circuits;

2. The decision raises no important question of federal law that has not been, but should be, settled by this Court; and

3. The decision simply holds, correctly, that:

(a) petitioner's factual allegations as an injured shareholder run squarely into the black letter law that a shareholder has no antitrust standing to sue for alleged injuries to the corporation; and

(b) petitioner's factual allegations as a terminated employee do not bring him within the limited exception to the general rule of antitrust standing carved out in the only case he relies on, *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985) ("*Ostrofe II*").

PARTIES TO THE PROCEEDING

Respondents are Waste Management, Inc. and Waste Management of Alameda County, Inc. Petitioner is Leonard G. Vinci, a former employee of Waste Management of Alameda County, Inc. (formerly known as Oakland Scavenger Company).

Respondent Waste Management of Alameda County, Inc. has no nonwholly owned subsidiaries, and is wholly owned by respondent Waste Management, Inc., which in turn is wholly owned by WMX Technologies, Inc. Waste Management, Inc. also has one nonwholly owned subsidiary, WMI Medical Services, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Statutes Involved	1
Statement of the Case	1
I. Course Of Proceedings And Disposition Of The Case Below	3
A. Petitioner's Allegations	3
B. The San Francisco Superior Court's Decision	4
C. The United States District Court's Decisions	5
D. The California Court Of Appeal's Decision	6
E. The Ninth Circuit's Decision	7
II. Correction Of Misstatements In The Petition Relating To The Procedural History	8
Reasons for Denying the Writ	8

Contents

		Page
I.	There Is No Conflict In Decisions Justifying Review.	9
II.	There Is No Important Federal Question To Review.	11
III.	There Is No Other Reason To Grant The Writ.	13
Conclusion		14

TABLE OF CITATIONS

Cases Cited:

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 12, 13

Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 9, 10, 11, 12, 13

Boisjoly v. Morton Thiokol, Inc., 706 F. Supp. 795 (D. Utah 1988) 11

Callahan v. Scott Paper Co., 541 F. Supp. 550 (E.D. Pa. 1982) 11

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 12, 13

Contents

	Page
Exhibitors' Service, Inc. v. American Multi-Cinema, Inc., 788 F.2d 574 (9th Cir. 1986)	10
Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209 (6th Cir. 1989)	10
Feeney v. Chamberlain Mfg. Corp., 831 F.2d 93 (5th Cir. 1987)	10
Gallant v. BOC Group, Inc., 886 F. Supp. 202 (D. Mass. 1995)	11
Gregory Mktg. Corp. v. Wakefern Food Corp., 787 F.2d 92 (3d Cir.), *cert. denied*, 479 U.S. 821 (1986)	10
Haight v. Matsushita Elec. Corp. of America, 676 F. Supp. 1332 (E.D. Va. 1987)	11
In re Indus. Gas Antitrust Litig. (Bichan v. Chemetron Corp.), 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983)	9, 10, 11
Lucas v. Bechtel Corp., 800 F.2d 839 (9th Cir. 1986)	10
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	13
McNulty v. Borden, Inc., 542 F. Supp. 655 (E.D. Pa. 1982)	11
Morgan Stanley Mortg. Capital, Inc. v. Insurance Com'r of Cal., 18 F.3d 790 (9th Cir. 1994)	7

Contents

Page

Ostrofe v. H.S. Crocker Co. 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 460 U.S. 1007 (1983) 9, 10

Ostrofe v. H.S. Crocker Co., 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985) .. i, 2, 4, 5, 7, 8, 9, 10, 11

Radovich v. National Football League, 352 U.S. 445 (1957) 13

Rafferty v. Nynex Corp., 744 F. Supp. 324 (D.D.C. 1990) 11

Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995) 12, 13

Reitz v. Canon USA, Inc., 695 F. Supp. 552 (S.D. Fla. 1988) 11

Sherman v. British Leyland Motors, Ltd., 601 F.2d 429 (9th Cir. 1979) 14

Solinger v. A. & M. Records, Inc., 718 F.2d 298 (9th Cir. 1982) 14

Stein v. United Artists Corp., 691 F.2d 885 (9th Cir. 1982) 14

Thomason v. Mitsubishi Elec. Sales America, Inc., 701 F. Supp. 1563 (N.D. Ga. 1988) 11

Contents

	Page
Vinci v. Waste Management, Inc., 36 Cal. App. 4th 1811, 43 Cal. Rptr. 2d 337 (1995)	2, 4, 6, 7
Vinci v. Waste Management Inc., 1994 U.S. Dist. LEXIS 12071 (N.D. Cal. 1994), *aff'd*, 80 F.3d 1372 (9th Cir. 1996)	5, 8
Vinci v. Waste Management Inc., 80 F.3d 1372 (9th Cir. 1996), *reh'g and reh'g en banc denied* (October 4, 1996), *petition for cert. filed* (January 2, 1997)	1, 2, 3, 4, 7, 8
Weisensee v. Chronicle Pub. Co., 59 Cal. App. 3d 723, 129 Cal. Rptr. 188 (1976)	4
Winther v. DEC Intern., Inc., 625 F. Supp. 100 (D. Colo. 1985)	11
Statutes Cited:	
15 U.S.C. § 1	1
15 U.S.C. § 2	1
15 U.S.C. § 15	1
Rule Cited:	
Supreme Court Rule 10	9, 11

Contents

Page

Other Authority Cited:

II Areeda and Hovenkamp, *Antitrust Law* (1995) 11

Respondents request that the Court deny the petition. The Court of Appeals' decision is reported at 80 F.3d 1372 (9th Cir. 1996), *reh'g and reh'g en banc denied* (October 4, 1996), *petition for cert. filed* (January 2, 1997). (For the Court's convenience, this brief will cite to the opinion attached as Exhibit A to the petition as "Op. at __".)

STATUTES INVOLVED

Petitioner is correct that this case involves Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. It also involves Section 4 of the Clayton Act, 15 U.S.C. § 15, which provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This is the seventh time that petitioner Leonard G. Vinci, a former employee fired for malfeasance, has tried to convince a court that his time-barred wrongful termination claim is somehow cognizable under the antitrust laws. Four state and federal courts, on six occasions (including three published opinions), have already rejected that argument and held as a matter of law that petitioner's factual allegations do not entitle him to relief under the sole, outlier case he relies on and, accordingly, that he has no standing to assert his purported antitrust claims.

Plaintiff supposes that he was the victim of a grand conspiracy by Waste Management, Inc. and its wholly-owned subsidiary, Waste Management of Alameda County, Inc. (collectively, "Waste Management"). The so-called conspiracy purportedly had the aim to drive petitioner out of business. But petitioner admits he was never in business — a corporation whose stock he owned was. He sold his stock in that company to Waste Management and became its employee. He was later fired, for malfeasance. Petitioner apparently takes issue with the grounds for that termination, but he failed to bring a timely wrongful termination claim, and filed this action instead.[1]

An antitrust action is not a substitute for a timely-filed wrongful termination claim. Thus, as the Ninth Circuit held, petitioner did not and could not allege that he suffered antitrust injury — injury of the type the antitrust laws were designed to prevent — or that he had antitrust standing. Instead, he alleged that: (1) "his company" was driven out of business by Waste Management — but he has no antitrust standing, as its shareholder or otherwise, to complain about that (Op. at 8); and (2) he was fired after he became Waste Management's employee for refusing to go along with a "planned predatory attack" (that even he admits never happened) — but he does not even meet the test for terminated employee antitrust standing announced by the only case he relies on, *Ostrofe II*, much less comply with traditional antitrust standing requirements. (Op. at 9-11).

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1. Petitioner actually filed a nearly identical complaint in California state court first, substituting the California Cartwright Act for the Sherman Act (pp. 4-5, below). The San Francisco Superior Court sustained Waste Management's demurrer to petitioner's Cartwright Act claim, and the California Court of Appeal affirmed that decision. *Vinci v. Waste Management, Inc.*, 36 Cal. App. 4th 1811, 43 Cal. Rptr. 2d 337 (1995). Meanwhile, petitioner filed his virtually identical federal complaint, had it dismissed without prejudice, filed it again, and had it dismissed again, with prejudice. The Ninth Circuit affirmed that second dismissal, and its decision led to this petition.

The Court of Appeals' decision is absolutely correct, and in accord with the law of this Court and all other circuits to have considered the issue. There is no reason for this Court to intervene. (Pp. 9-14, below).

I. Course Of Proceedings And Disposition Of The Case Below

A. Petitioner's Allegations

Petitioner first filed this case (actually, one just like it) in California Superior Court on January 12, 1994. (Op. at 5; n. 1, above). Petitioner alleged, in both his state and federal actions, that he was the victim of antitrust and other violations by Waste Management.[2] His claims arose out of Waste Management's alleged conduct during two distinct periods: (1) after the parties settled prior litigation in 1989, but before petitioner came to work for Waste Management ("the pre-employment period") (First Amended Complaint ("FAC"), ¶¶ 3-6), and (2) after petitioner was hired by Waste Management but before his termination on December 2, 1992 ("the employment period"). (FAC, ¶¶ 7-14).

Petitioner alleged that, during the pre-employment period, Waste Management breached the settlement agreement in an attempt to put his company, Vinci Enterprises, out of business. (Op. at 5; FAC, ¶¶ 4-6). During the employment period, petitioner said, Waste Management tried to put out of business a man named Richard Valle, who was engaged in a joint venture with Waste Management. (Op. at 5; FAC, ¶ 11). Also during the employment period, petitioner alleged that defendants tried

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2. This brief will cite to the allegations in petitioner's amended federal complaint, which are at issue here. The allegations in his state complaint were substantively identical.

to force him to participate in anticompetitive acts directed at Waste Management's competitor and, when he refused, terminated him. (Op. at 5; FAC, ¶¶ 12-14).

Petitioner claimed that these alleged acts were in furtherance of Waste Management's purported "scheme, conspiracy to restrain and monopolize and an attempt to monopolize the intrastate and interstate business of garbage collection and recycling," the ultimate goal of which, allegedly, was "to gain a monopoly of garbage and recycling services in the East Bay Area, and to set the groundwork for achieving a monopoly in Northern California." (FAC, ¶¶ 15-17; *see also* Pet. at 3).[3]

B. The San Francisco Superior Court's Decision

Petitioner's state court complaint alleged, among other claims, a violation of the California Cartwright Act, which, like the Sherman Act, requires that private plaintiffs have antitrust standing. *See Weisensee v. Chronicle Pub. Co.*, 59 Cal. App. 3d 723, 728, 129 Cal. Rptr. 188, 191 (1976); *Vinci*, 36 Cal. App. 4th at 1814 & n. 1, 43 Cal. Rptr. 2d at 338-39 & n. 1. Waste Management demurred to the complaint, and the demurrer was sustained and the complaint dismissed. On the issue of antitrust standing under the Cartwright Act, petitioner relied almost exclusively on *Ostrofe II*. The Superior Court found that, on the face of the complaint, petitioner did not meet any of the

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3. Petitioner has never alleged, or even argued, in any forum, that any antitrust violation ever actually occurred. Instead, he maintains that his actions prevented an antitrust violation. (Pet. at 3). Thus, petitioner argues for a rule whereby one who complains about an antitrust violation that never happened may nonetheless avail himself of antitrust remedies. That would be unprecedented, and plainly wrong.

threshold requirements of that case. Accordingly, the Court held "plaintiff has no standing," and explained:

> [*Ostrofe II*] requires that a fired employee must show that the antitrust violation will be unremedied without the employee's lawsuit and that the Plaintiff is an essential participant in the alleged wrongful conduct and that the conduct could not succeed without his cooperation.

C. The United States District Court's Decisions

Petitioner then filed a substantively identical complaint in the United States District Court, substituting the Sherman Act for the Cartwright Act. The court granted Waste Management's motion to dismiss that complaint (with leave to amend), holding that petitioner failed to allege either antitrust standing or any substantive antitrust claim. *Vinci v. Waste Management, Inc.*, 1994 U.S. Dist. LEXIS 12071 at *14-20 (N.D. Cal. 1994), *aff'd*, 80 F.3d 1372 (9th Cir. 1996). The District Court, like the Superior Court, considered, and rejected, the application of *Ostrofe II* to petitioner's allegations:

> Vinci maintains that *Ostrofe* is directly on point. . . . *Ostrofe*, however, is readily distinguishable and its application to the facts of this case would unnecessarily expand a relatively narrow holding of the ninth circuit.

Vinci, 1994 U.S. Dist. LEXIS 12071 at *11-12.[4]

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4. The court also held petitioner lacked antitrust standing as an allegedly injured shareholder. *Id.* at *8-9.

Petitioner then filed his first amended complaint, the subject of this petition. However, even with the benefit of the district court's comprehensive prior opinion as a roadmap, petitioner still failed to allege an antitrust violation he has standing to bring, and the court again dismissed the complaint, this time with prejudice:

> Vinci's amended complaint does not overcome the deficiencies found in his original complaint and noted in the previous Order of Dismissal .... Since Vinci has failed to plead a cognizable claim after being given two opportunities to do so, the Court dismisses his claim with prejudice for lack of standing.

Petitioner appealed that decision to the Ninth Circuit. (Part E, below).

D. The California Court Of Appeal's Decision

Meanwhile, on the state court side, petitioner appealed only the dismissal of his Cartwright Act claim, and the California Court of Appeal affirmed. *Vinci v. Waste Management, Inc.*, 36 Cal. App. 4th 1811 (1995). That court agreed with the others that "petitioner has made no allegations to bring him within the *Ostrofe* case." *Id.* at 1817. The court went on:

> Plaintiff's remedy for his own injury is a wrongful termination action. Plaintiff cannot resurrect that time-barred cause of action by framing his lawsuit as an antitrust claim. We hold that plaintiff is not a proper party to bring an action for antitrust violations by his employer. (footnote omitted)

Id. at 1816. Petitioner did not petition the California Supreme Court for review of that decision and it became final on September 9, 1995.

E. The Ninth Circuit's Decision

On April 10, 1996, the Ninth Circuit likewise affirmed the district court's dismissal of petitioner's federal action. The Court held that petitioner suffered no antitrust injury (Op. at 9), and did not fall within *Ostrofe II*'s "limited exception to the general rule that a terminated employee lacks antitrust standing" because he "did not allege any facts which suggest": (1) "that he was essential to the alleged antitrust scheme"; (2) "that his termination was necessary to accomplish the scheme"; or (3) that he had the "greatest incentive to challenge the antitrust violation." (Op. at 10-11). The court held that the *Ostrofe II* exception is "limited to cases in which a dismissed employee" satisfies all three of those factors. (Op. at 10).[5] Petitioner claims that the Ninth Circuit's holding "eviscerated" *Ostrofe II.* (Pet. at 4).

The Court of Appeal denied petitioner's petition for rehearing with suggestion for rehearing en banc, and this petition followed.

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5. The court also held, citing long-standing, black letter Ninth Circuit law, that petitioner had no standing as a former shareholder of a company allegedly injured by Waste Management's conduct. (Op. at 8; pp. 13-14, below). The court did not need to reach the independent grounds for affirming the judgment: (1) that petitioner failed to allege that any antitrust violation ever happened (n. 3, above) and (2) that the California Court of Appeal's final decision affirming petitioner's lack of antitrust standing under his substantively identical Cartwright Act claim (Part D, above) collaterally estopped him from re-litigating his antitrust standing under the Sherman Act. *See, e.g., Morgan Stanley Mortg. Capital, Inc. v. Insurance Com'r of Cal.*, 18 F.3d 790, 792-93 (9th Cir. 1994).

II. Correction Of Misstatements In The Petition Relating To The Procedural History

Petitioner claims that the district court, in dismissing his complaint, "specifically decided not to follow the Ninth Circuit's decision in [*Ostrofe II*] and opted instead for the Seventh Circuit's contrary decision in *Bichan v. Chemetron Corp.*" (Pet. at 4). That is false. The district court, like the Ninth Circuit and every other court to consider petitioner's claim (pp. 4-7, above), applied the test for employee standing set forth in *Ostrofe II*, but simply found petitioner does not meet it. *Vinci*, 1994 U.S. Dist. LEXIS 12071 at *14-18.

Petitioner also attacks the Ninth Circuit's statement of the *Ostrofe II* test he cannot meet. Thus petitioner asserts that the court below "invented the idea that Ostrofe was an 'essential' participant in the conspiracy." (Pet. at 7). But the Ninth Circuit did not "invent" anything — it quoted *Ostrofe II* for that "idea" (Op. at 10) and *Ostrofe II* plainly said so. 740 F.2d at 745-46.

Petitioner also claims that the Ninth Circuit's observation that "there was no one else [other than Ostrofe] with as strong an incentive 'to vindicate the public interest in antitrust enforcement'" (Op. at 10) "simply belies the record." (Pet. at 7). That too is wrong. Again, the court below quoted *Ostrofe II* for the test it applied. (Op. at 10).

Both courts below correctly applied the *Ostrofe II* factors and determined they are not met by petitioner's allegations. Petitioner's attacks on those determinations are unfounded.

REASONS FOR DENYING THE WRIT

Petitioner offers no "compelling reason" why this Court should exercise its discretion to review this case under the

guidelines of Supreme Court Rule 10. The Ninth Circuit's straightforward application of the law plaintiff himself urged to the facts he alleged was correct, and certainly raises no issue for this Court. The Ninth Circuit's decision is also in accord with the decisions of this Court and other circuits, raises no conflict with them, and so presents no reviewable issue for that reason too. Finally, the decision raises no important question of federal law, much less one this Court has not settled.

I. THERE IS NO CONFLICT IN DECISIONS JUSTIFYING REVIEW.

Petitioner argues *certiorari* review is required because "the federal appellate courts have split on the issue of whether an employee discharged for refusal to further an antitrust conspiracy has standing under the antitrust laws." (Pet. at 5). But by petitioner's own telling, this decision "eviscerated" *Ostrofe II* (Pet. at 4), the only federal appellate decision ever to have found standing for a terminated employee. (*See* below). Thus, petitioner admits that this decision eliminates, not creates, a conflict, thereby eliminating, not creating, the need for *certiorari* review.

In fact, this decision is just the latest in a long line of cases limiting or rejecting *Ostrofe II*.[6] Subsequent Ninth Circuit cases

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6. *Ostrofe II* itself was a 2-1 decision, with Judge, now Justice, Kennedy issuing a forceful dissent. The case had first reached the Ninth Circuit in 1982, and the court found standing, 2-1, with Judge Kennedy dissenting. *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982) (*"Ostrofe I"*), *vacated and remanded*, 460 U.S. 1007 (1983). Shortly thereafter, the Seventh Circuit considered the identical issue, soundly rejected *Ostrofe I's* reasoning, and denied standing. *In re Indus. Gas Antitrust Litig. (Bichan v. Chemetron Corp.)*, 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983) (*"Bichan"*). The losing parties in both *Ostrofe I* and *Bichan* petitioned for *certiorari*. The next year, this Court decided *Associated Gen. Contractors of*

(Cont'd)

declined to extend *Ostrofe II* beyond its facts. *See Lucas v. Bechtel Corp.*, 800 F.2d 839 (9th Cir. 1986); *Exhibitors' Service, Inc. v. American Multi-Cinema, Inc.*, 788 F.2d 574 (9th Cir. 1986). No other circuit court has followed it. *See Fallis v. Pendleton Woolen Mills, Inc.*, 866 F.2d 209, 211-12 (6th Cir. 1989) (fired employee's injury "merely incidental to the purposes of the alleged price-fixing arrangement"); *Feeney v. Chamberlain Mfg. Corp.*, 831 F.2d 93, 95-96 (5th Cir. 1987) (terminated employee lacks antitrust standing); *Gregory Mktg. Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 96 (3d Cir.) (rejecting rationale of *Ostrofe II*), *cert. denied*, 479 U.S. 821 (1986); *Bichan*, above, 681 F.2d at 519 (rejecting *Ostrofe I* and adopting Judge Kennedy's dissent). This decision simply follows that trend. (Op. at 10-11). Thus, to the extent a "split" among the circuits existed, this decision, if anything, resolves it by severely limiting — or, if plaintiff prefers, "eviscerating" — *Ostrofe II* within its own circuit.

(Cont'd)

Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) ("*AGC*"), and remanded *Ostrofe I* for reconsideration in light of that decision while on the same day denying *certiorari* in *Bichan*. As Justice Kennedy observed in dissent in *Ostrofe II*:

> [B]y reaffirming *Ostrofe I*, the majority creates a conflict with the Seventh Circuit in *Bichan* .... To say, as the majority does, that the Supreme Court does not worry about circuit conflict when it comes to antitrust standing, *see* Majority Opinion at 747-748, is a strange way to interpret the Supreme Court's order vacating the majority's first opinion. [¶] *Bichan* was an explicit consideration and rejection of the majority's opinion in *Ostrofe I*, and the Supreme Court chose to deny *certiorari* in *Bichan* on the same day *Ostrofe I* was vacated.

740 F.2d at 751 (Kennedy, J., dissenting).

Petitioner also argues (Pet. at 5-6) that this Court should resolve the "split" between the few district courts that have followed the rationale of *Ostrofe II* and the many others that have rejected it.[7] But: (1) a "split" among district courts does not satisfy the requirements for review under Supreme Court Rule 10; and (2) in any event, this case, if anything, resolves that split, and so eliminates, not creates, the need for review.

II. THERE IS NO IMPORTANT FEDERAL QUESTION TO REVIEW.

Petitioner also claims this Court "had reserved [in *AGC*] the question of whether a direct victim of an antitrust violation who suffers injury unrelated to antitrust policies can have standing under Section 4" and argues the Court should "accept

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7. *See Gallant v. BOC Group, Inc.*, 886 F. Supp. 202, 207-08 (D. Mass. 1995) (declining to follow *Ostrofe II* to "expand upon the doctrine of standing currently in place in this circuit"); *Rafferty v. Nynex Corp.*, 744 F. Supp. 324, 328 (D.D.C. 1990) (declining to follow *Ostrofe II*); *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 805 (D. Utah 1988) ("*Ostrofe*'s holding is . . . contrary to virtually all other decisions addressing this issue."); *Thomason v. Mitsubishi Elec. Sales America, Inc.*, 701 F. Supp. 1563, 1569-70 (N.D. Ga. 1988) (declining to follow *Ostrofe II*); *Reitz v. Canon USA, Inc.*, 695 F. Supp. 552, 554 (S.D. Fla. 1988) (following *Bichan* and *Ostrofe II* dissent); *Haigh v. Matsushita Elec. Corp. of America*, 676 F. Supp. 1332, 1345-46 (E.D. Va. 1987) ("this court must reject the *Ostrofe* [*II*] analysis"); *Winther v. DEC Intern., Inc.*, 625 F. Supp. 100, 103 (D. Colo. 1985) ("Nothing in [*AGC*] supports [*Ostrofe II*'s] interpretation of the scope of antitrust law."); *McNulty v. Borden, Inc.*, 542 F. Supp. 655, 661 (E.D. Pa. 1982) (declining to "extend[] standing under the antitrust laws as far as the Ninth Circuit has [in *Ostrofe I*]"); *Callahan v. Scott Paper Co.*, 541 F. Supp. 550, 561 (E.D. Pa. 1982) ("I do not believe that *Ostrofe* [*I*] was correctly decided."); *see also* II Areeda and Hovenkamp, *Antitrust Law* ¶ 377d5 at 316-17 (1995) ("Most courts correctly deny standing because the employee's loss of employment did not reflect the reduced product-market competition that created the alleged antitrust violation.").

the question it specifically reserved." (Pet. at 6) . That argument is wrong from start to finish.

Petitioner apparently relies on footnote 44 of *AGC*, *see Ostrofe II*, 740 F.2d at 746, but misstates what it says. That footnote reads:

> We therefore need not decide whether *the direct victim of a boycott*, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant market.

AGC, 459 U.S. at 910, n. 44 (emphasis added). Vinci was not the victim, direct or indirect, of any boycott (Op. at 10), so footnote 44 does not apply to him in the first place, and his petition therefore does not raise any question that footnote may have "reserved."

But even assuming the question of petitioner's standing — as a non-boycott victim "who suffers a type of injury unrelated to antitrust policy" — had been "reserved" in *AGC*, that question was resolved against him in this Court's later decisions. In *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) ("*ARCO*"), the Court reiterated the rule that "injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive aspect of the practice under scrutiny." *Id.* at 334 (*citing Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-110 (1986)); *see also id.* at 339 (antitrust injury requires that a private party be "adversely affected by an *anticompetitive* aspect of the defendant's conduct"); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir.), *cert. denied*, 116

S. Ct. 515 (1995) (same).[8] This decision is in accord with that settled rule. (*See* Op. at 9).

ARCO and *Cargill* dispose of petitioner's argument; this petition raises no important question of federal law requiring review.

III. THERE IS NO OTHER REASON TO GRANT THE WRIT.

Finally, petitioner offers two other, rather puzzling "reasons for granting the writ." Petitioner first cites the Ninth Circuit's purportedly "false ground that employees do not generally have standing under the antitrust laws." (Pet. at 9). Although no argument supports that "reason," petitioner apparently believes the Ninth Circuit's observation that "[t]he loss of a job is not the type of injury that the antitrust laws were designed to prevent" (Op. at 9) conflicts with *Radovich v. National Football League*, 352 U.S. 445 (1957). (Pet. at i). That is wrong. In *Radovich*, the plaintiff was allowed to challenge a group boycott *in the market for his labor*. 352 U.S. at 447. Here, the Court's statement was obviously made in the context of a terminated employee seeking to challenge an alleged restraint in the market in which he was neither a consumer nor a competitor — *i.e.*, the market in which his former employer competed. (Op. at 9). The Court's statement of the general rule in such cases is absolutely correct and, in any event, raises no issue worthy of this Court's review. (Pp. 9-10, above).

Petitioner's final contention (Pet. at 9-10) apparently refers to the Ninth Circuit's holding that [a] shareholder of a corporation injured by antitrust violations has no standing to

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8. That is true even where, unlike here, the alleged violation is *per se* illegal. *ARCO*, 495 U.S. at 344-45 (*citing Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) *and AGC*, 459 U.S. 519 (1983)).

sue in his or her own name.' " (Op. at 8 (*quoting Solinger v. A. & M. Records, Inc.*, 718 F.2d 298, 299 (9th Cir. 1983) *and citing Stein v. United Artists Corp.*, 691 F.2d 885, 897 (9th Cir. 1982) *and Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 439 (9th Cir. 1979)). But that holding simply reflects black letter Ninth Circuit law. Petitioner does not claim that law was wrongly applied, or that its application conflicts with any other decision, anywhere. It is no basis to grant the writ.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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